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IN THE
COURT OF APPEALS OF INDIANA

ROBERT P. SPRUIT, RAYMOND TON, JR., JIM VAN LAERE, GERALD PETRON, LARRY PEREZ, PHILLIP W. and BETTY AHLENIUS, NORBERT and HELEN DURAY, MICHAEL C. WALTHER,	)	
Appellants-Petitioners,	)	
vs.	)	No. 50A04-0610-CV-594

MARSHALL COUNTY, INDIANA PLAN COMMISSION, ADAMS PLACE, LLP, d/b/a ADAMS PLACE, LLC, DR. CHRISTIE PETERSON and DENNIS ELLIOTT, MARSHALL COUNTY, INDIANA BUILDING INSPECTOR,

Appellees-Respondents.

APPEAL FROM THE MARSHALL SUPERIOR COURT
The Honorable Robert O. Bowen, Judge
Cause No. 50D01-0508-MI-6

May 18, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Robert P. Spruit, Raymond Ton, Jr., Jim Van Laere, Gerald Petrow, Larry Perez, Phillip W. and Betty Ahlenius, Norbert and Helen Duray, Michael C. Harris, and Chester and Judith A. Walther (collectively, "the Neighbors") appeal the denial of their petition for writ of certiorari and request for a permanent injunction. We affirm.

Issue

The Neighbors raise one issue, which we restate as whether the trial court properly denied their petition for writ of certiorari.

Facts

On May 9, 2005, the Marshall County Plan Commission ("Plan Commission") received a plat application from Christie Peterson seeking to subdivide a parcel of

property referred to as Adams Place, LLP. The 1.58-acre lakefront parcel contained two apartment buildings, each containing four units, a cottage, and a garage. Some of the buildings were non-conforming uses that were "grandfathered in" when the Marshall County Zoning Ordinance ("Zoning Ordinance") was adopted in 1974. Peterson sought to subdivide the parcel into one .88-acre parcel that would contain all of the structures and would have no lake access and another .70-acre parcel that would contain none of the structures and would have lake access.

On June 23, 2005, the Plan Commission held a public hearing on the application, at which evidence was heard, including objections from the Neighbors. That day, the Plan Commission approved the subdivision over the Neighbors' objections. On July 28, 2005, the Neighbors appealed to the Plan Commission the approval of Peterson's request to subdivide the parcel. This appeal was unsuccessful, and the Neighbors petitioned for a writ of certiorari and sought an injunction against Dennis Elliot, the Marshall County Building inspector, preventing him from issuing any building permits for the subdivided parcel. A paper record was eventually compiled and the trial court affirmed the Plan Commission's decision approving the subdivision and denying the request for injunctive relief. The neighbors now appeal that decision.

Analysis

The Neighbors claim that the trial court improperly affirmed the Plan Commission's decision. Indiana Code Section 4-21.5-5-14 prescribes the review of an administrative decision and provides that relief may only be granted if the agency action is: (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with

law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; or (5) unsupported by substantial evidence. Equicor Development, Inc. v. Westfield-Washington Twp. Plan Comm'n, 758 N.E.2d 34, 36 (Ind. 2001). "An administrative act is arbitrary and capricious only where it is willful and unreasonable, without consideration and in disregard of the facts and circumstances of the case, or without some basis that would lead a reasonable and honest person to the same conclusion." Rice v. Allen County Plan Comm'n, 852 N.E.2d 591, 597 (Ind. Ct. App. 2006), trans. denied. Indiana Code Section 4-21.5-5-14(a) also provides that the burden of demonstrating the invalidity of the agency action is on the party asserting invalidity. Equicor, 758 N.E.2d at 37.

In reviewing an administrative decision, we may not try the facts de novo or substitute our own judgment for that of the agency. Id. (citing Ind. Code § 4-21.5-5-11). We owe great deference to the administrative agency when the findings of fact or the application of the facts to the law are challenged. Town of Beverly Shores v. Bagnall, 590 N.E.2d 1059, 1061 (Ind. 1992). On the other hand, if the allegation is that the agency committed an error of law, no such deference is afforded and reversal is appropriate if error of law is demonstrated. Id. "Nevertheless, we will pay due deference to the interpretation of a statute by the administrative agency charged with its enforcement in light of its expertise in its given area." Bowles v. Griffin Industries, 855 N.E.2d 315, 320 (Ind. Ct. App. 2006), trans. denied. On appeal, to the extent the trial

court's factual findings were based on a paper record, we conduct our own de novo review of the record. Id.

Initially, we note the Neighbors argue that this case involves an alleged error of law and that the typical deference afforded to the decisions of an agency is not required here. We disagree with the Neighbors' assessment of this case. In deciding whether the Plan Commission's decision was proper we must apply the facts of this case to the law. Thus, we are faced with a mixed question of fact and law, requiring deference to the Plan Commission.

The Neighbors first argue that the subdivision of the parcel violates the Zoning Ordinance because the existing structures currently infringe upon, and will continue to infringe upon, the applicable setbacks. After reviewing the minutes from both the June 23, 2005 and the July 28, 2005 hearings and a letter from the Neighbors' attorney to the Plan Commission, however, it does not appear that the Neighbors made this argument before the Plan Commission.

The June 23, 2005 hearing included the Neighbors' testimony concerning parking, density, loss of trees, the apartment residents' lake access, and potentially declining property values. At the July 28, 2005 hearing, the Neighbors' attorney argued that the approval of the subdivision "was an impermissible exercise of power and the commission's decision resulted in at least two violations of the Marshall County Zoning Ordinance." App. p. 126. He then described the two alleged violations as: 1) an impermissible increase in density, and 2) the "absorbation" of the non-conforming use.

Id. The Neighbors did not mention the alleged setback violations or the Zoning Ordinances defining appropriate setbacks.

"A party may only obtain judicial review of an issue that was raised before the administrative agency and preserved for review." Indiana Educ. Employment Relations Bd. v. Tucker, 676 N.E.2d 773, 776 (Ind. Ct. App. 1997); see also I.C. § 4-21.5-5-10. Failure to raise this issue before the Plan Commission deprived the Plan Commission of the opportunity to interpret the setback ordinances, determine their applicability under these facts, and decide this issue. This issue is waived because the Neighbors did not raise the issue before the Plan Commission. See Indiana Dept. of Envtl. Mgmt. v. Lake County Solid Waste Mgmt. Dist., 847 N.E.2d 974, 991 (Ind. Ct. App. 2006), trans. denied.

The Neighbors also argue that changed lot size of the parcel containing the apartment buildings and cottage increases the density to an impermissible amount. They contend that Section 306 of the Zoning Ordinance requires 6,000 square feet of land for each dwelling unit and that after the subdivision there is only 4,259.20 square feet per dwelling unit.

Indeed, Section 306 of the Zoning Ordinance requires a single family parcel in an area zoned L-1 to have a minimum lot area of 6,000. See App. p. 285. Here, however, the structures were built prior to the adoption of the Zoning Ordinance, and they are non-conforming uses. Even though the area is zoned L-1 single family, these structures are not single-family uses. It not clear whether the ordinance governing U-1 multiple family minimum lot area applies here or whether none of the minimum lot area requirements are

applicable because the structures are non-conforming uses. Regardless, the determination was left to the sound discretion of the Plan Commission.

At the July 28, 2005 hearing, the density was discussed by the Plan Commission members, Peterson, and the Neighbors. In fact, although the Neighbors' attorney made this specific argument to the Plan Commission, none of the Plan Commission members voted to reconsider the issue. Thus, the decision stood, notwithstanding this specific density argument. Without more, the Neighbors have not established the Plan Commission's decision was not in accordance with the law.

Finally, the Neighbors assert that the approval of the subdivision violates Section 431.4 of the Zoning Ordinance, which provides, "Any structure, or structure and land in combination, in or on which a non-conforming use is superceded by a permitted use, shall thereafter conform to the regulations for the district in which a such a structure is located, and the non-conforming use may not thereafter be resumed." App. p. 323. The Neighbors argue, "This Section forbids property owners from eliminating the nonconformity on only part of a parcel, and, instead, requires all nonconformity on the parcel to be eliminated." Appellants' Br. p. 16. At best, this is a strained reading of this Section.

Ultimately, though, the non-conforming structures—the apartment buildings—have never been anything other than apartment buildings. Thus, they have not been superceded by a permitted use, and Peterson is not attempting to resume a non-conforming use by turning them back into apartment buildings. The Neighbors unsuccessfully attempt to fit a square peg into a round hole with this argument.

Further, the Zoning Ordinance focuses on prohibiting the enlargement of non-conforming structures. See App. pp. 322-323. Peterson was not seeking to enlarge the apartment buildings or otherwise increase the non-conforming structures. The Neighbors have not shown that the Plan Commission was without authority to approve the subdivision of the parcel.

Conclusion

The Neighbors have not established that the Plan Commission improperly authorized Peterson to subdivide the parcel. We affirm.

Affirmed.

NAJAM, J., and RILEY, J., concur.